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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 321

BARBERS UNION OF MEMPHIS, LOCAL NO. 36, GEORGE McNAMARA, Secretary of Local No. 36; J. P. OSBORNE; TINTO O. MASNER; and LEE SAXON, Petitioners,

vs.

L. A. FLATT, Respondent.

BRIEF OF L. A. FLATT IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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INDEX

Question Presented 1

Statement of the Case 2

Argument 3

Right to Work Statute 3

Combination to Impair Competition and Enhance Prices 7

Conclusion 8

Certificate of Service 10

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Question Presented

May the Supreme Court of Tennessee enjoin peaceful picketing upon finding that the objective of such picketing is "to put the complainant (employer) completely out of business unless he complies with their (the Union's) demands" that he "join the local barbers' union and raise his prices for barbering 25%" in violation of the State's public policy as set forth in its "Right to Work" statute and in judicial decisions prohibiting combinations which "tend to impair competition in trade and to enhance prices to the injury of the public"?

No question of interstate commerce is involved.

Statement of the Case

Petitioners' statement of the case is substantially accurate and complete except insofar as it discusses the effect of a hearing on bill and answer under Tennessee procedure (page 10, note 4, petitioners' brief). Petitioners fail to point out that "legal deductions insisted on in the answer" are not admitted as true. The significance of this rule in the disposition of this case by the Supreme Court of Tennessee will be discussed hereinbelow.

Briefly stated, the facts in this case are as follows:

For several months, members of the local barbers' union in Memphis attempted to induce the respondent, Flatt, to join the union and to maintain union working conditions in his shop where he employed three barbers none of whom were members of the union. Respondent, who worked along side of his three employees, declined to join the union and to raise his prices for barbering some 25% to union levels.

Thereupon, members of the union prevailed upon the Memphis Linen Supply Company to refuse to deliver necessary laundry and barber supplies to respondent and commenced picketing his shop, which was located in his home, with signs reading, "This Shop Does Not Employ Union Barbers."

A preliminary injunction against picketing or otherwise obstructing or interfering with respondent's barber shop and home was issued by the Chancery Court of Shelby County, Tennessee, and subsequently made permanent.

On appeal to the Supreme Court of Tennessee, the Chancellor was first reversed but upon petition to rehear the original opinion was withdrawn and the Chancery Court was affirmed.

Argument

We respectfully submit that no Federal question is presented in this case in view of the fact that it is now settled beyond dispute that a State Court may enjoin peaceful picketing for an objective which it finds to be in violation of the State's public policy enunciated either by the legislature or the courts of that State, provided only that the policy is not in conflict with the Federal Constitution.[1]

In the present case, the Supreme Court of Tennessee found that the picketing violated both the State's Right to Work statute and its judicial policy against combinations which "tend to impair competition in trade and to enhance prices to the injury of the public."

Right to Work Statute

Tennessee's "Right to Work Law" provides that:

> "It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind." (Tennessee Code, Section 50-208).

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[1]Building Service Employees International Union v. Gazzam, 339 US 532, 94 L. ed 1045, 70 S. Ct. 784; International Brotherhood of Teamsters, C. & W. H. Union v. Hanke, 339 US 470, 94 L. ed 995, 70 S. Ct. 773, 13 ALR 2d 631; Hughes v. Superior Court of California, 339 US 460, 94 L. ed 985, 70 S. Ct. 718; Giboney v. Empire Storage & Ice Co., 336 US 490, 93 L. ed 834, 69 S. Ct. 684; Thomas v. Collins, 323 U S 516, 537, 538, and 543, 544 (concurring opinion), 89 L. ed. 430, 444, 445, 447, 448, 65 S. Ct. 315; Bakery & P. Drivers & Helpers, I.B.T. v. Wohl, 315 US 769, 776, 777 (concurring opinion), 86 L. ed 1178, 1187, 62 S Ct. 816; Carpenters & J. Union v. Ritter's Cafe, 315 US 722, 86 L. ed. 1143, 62 S. Ct. 807; Carlson v. California, 310 US 106, 84 L. ed. 1104, 60 S. Ct. 746; Thornhill v. Alabama, 310 US 88, 103, 104, 84 L. ed. 1093, 1102, 1103, 60 S. Ct. 736; Senn. v. Tile Layers Protective Union, 301 US 468, 479-481, 81 L. ed. 1229, 1236-1238, 57 S. Ct. 857; Local Union No. 10, A.F. of L. v. Graham, 345 US 192, 73 S. Ct. 585, 97 L. ed. 946.

Petitioners seek to show that the picketing in this case did not violate the above statute because of the allegations in the answer to the effect that they have never insisted that respondent or his employees join the union or that he discharge his present employees and that the purpose of the picketing was to advertise that the shop was being operated under non-union conditions. Petitioners point out that in Tennessee allegations of fact in an answer are admitted as true when the case is heard on bill and answer without the introduction of the testimony of witnesses.

Petitioners also admit in their answer, however, that a group of barbers had called on respondent, inviting him to "join with them" in an effort to improve working conditions and that the pickets in this case, all of whom were members of the Memphis barbers' union, carried signs reading, "This Shop Does Not Employ Union Barbers."

It is well settled in Tennessee, that in a hearing on bill and answer, legal deductions insisted on in the answer are not to be considered as true and that the judicial function of the court in drawing conclusions from those facts which are admitted is not eliminated or restricted in any way by this type of hearing. (*Rodgers v. Rodgers* (6 Heisk.) 53 Tenn. 489; *Seat v. Seat*, 172 Tenn. 618, 113 SW (2d) 751; *Petty v. Sloan*, 197 Tenn. 630, 277 SW (2d) 355).

Petty v. Sloan, supra, involved the construction of a written contract and was heard on bill and answer. The defendant contended that the construction must be determined in accordance with the allegations in the answer as to the intention of the parties. The Court pointed out, however, that legal deductions in the answer were not to be considered as true and that the ascertainment of the intention of the parties was a judicial function. It held:

> "We think that the parties are exactly in the same position as they would have been if the cause had not been set for hearing on bill and answer. Nobody has lost any rights by reason of the way the suit was tried below." (197 Tenn. 637).

We therefore insist that the purpose and objective of the picketing in the instant case was a matter of judicial inquiry and that the Court was not foreclosed in this inquiry by statements in the answer as to the intention of petitioners and conclusions of the pleader as to the purpose of the picketing.

In the case of *Pruitt v. Lambert*, decided by the Supreme Court of Tennessee on February 8, 1957 and reported in 298 SW (2d), 795, picketing was enjoined after a hearing on bill and answer as in the present case. The defendants averred in their answer that they had never insisted that the complainant discharge any of its employees or that any of said employees should join the union. The Supreme Court nonetheless judicially determined that the picketing "was coercive with illegal objectives" in violation of the State's Right to Work Law. It emphasized that the pickets carried placards reading:

> "This store does not employ Union members in its meat market." "Neither does it observe hours, wages or working conditions prevailing in Union markets." "Please patronize stores where Union market cards are displayed."

and that the union proposed the execution of a contract which would have required the employer, among other things, to see that all of his employees remained in good standing with the union. The Court observed:

> "Then again, even if the employer had signed this contract, he would not have been entitled to display the

> Union card and would have been confronted still with the probability of being picketed for being a non-Union shop. Again, it is difficult to see how the employer could assist the business agent of the Union to see that all of his employees remain in good standing without forcing the nonunion employees either to join the Union and pay dues or to be discharged for failure to do so.
>
> In short, this type of picketing which is denominated 'stranger picketing' was not merely for the purpose of advertising but was coercive with illegal objectives."

The procedural situation in the instant case is similar to that in *Chucates v. Royalty*, 164 Ohio St. 214, 57 Ohio Ops. 432, 129 N. E. 2d 823, 37 LRRM 2028; certiorari denied 351 US 926, 100 L. ed. 1456, 76 S. Ct. 781, which was tried on an agreed statement of facts. It was insisted that the purpose of the picketing there enjoined was not set forth in the stipulation. The Court said:

> ". . . However, where parties agree that certain facts are 'the facts upon which' the 'court should consider' a case, the court, in deciding such case, may quite properly base its decision in part upon other facts that may reasonably be inferred from the facts agreed upon.
>
> In view of the facts agreed upon in the instant case, the Court of Appeals could hardly have found that there was any purpose for the picketing except the purpose of pressuring plaintiffs to compel their employees to join the defendant union." (37 LRRM 2030).

Petitioners have insisted in the present case that their purpose was to induce respondent to raise his prices but it is obvious from the facts admitted in the answer that had he done so, petitioners could and undoubtedly would have continued to picket as before because, "This Shop Does Not Employ Union Barbers."

The Supreme Court of Tennessee therefore apparently concluded, as it was entitled to do on the record in this case, that one of the objectives of petitioners' picketing was to coerce respondent to violate the State's Right to Work Law by either forcing his employees into the union or discharging them in order to employ union members. This is precisely the situation which prevailed in the case of *Plumbers' Union v. Graham*, 345 US 192, 73 S. Ct. 585, 97 L. ed. 946, where it was held that the Courts of Virginia might enjoin picketing carried on for the purpose of inducing a violation of that State's Right to Work Law.

Combination to Impair Competition and Enhance Prices

The avowed purpose of the picketing in the instant case was to coerce respondent to raise his prices to a level fixed by the union in its contracts with other employers and to injure or destroy his business if he continued to decline to do so.

The Supreme Court of Tennessee found that such an objective was in violation of the State's public policy against combinations designed to interfere with competition and to raise prices to the injury of the public. It quoted from *Bailey v. Master Plumbers*, 103 Tenn. 99, at page 100, as follows:

> "The Courts, with practical unanimity, hold that contracts, agreements, arrangements or combinations in whatever form or name, are contrary to public policy and void when they tend to impair competition in trade and to enhance prices to the injury of the public."

There can be no dispute regarding the Court's conclusion to the effect that petitioners were seeking in this in-

stance to further their campaign to eliminate competition between the barbers in Memphis insofar as prices were concerned, also to dictate the prices to be charged by the respondent, and to fix those prices at a level substantially higher than he was accustomed to charge. This constituted not only an invasion of respondent's right to determine what he would charge for his own labor which is a power denied even to the State[2] but was a penalty imposed upon the general public which must pay the higher prices to be charged.

[2] See *State v. Greeson*, 174 Tenn. 179, where a Tennessee statute authorizing the State Board of Barber Examiners to fix a schedule of prices for barber work was declared to be in violation of the due process and equal immunities provisions of the Federal and State Constitutions.

The Supreme Court further emphasized the unlawfulness of petitioners' effort to destroy respondent's business in order to enforce their demands. This it found to be violative of the State's public policy as laid down in the case of *Lyle v. Meat Cutters & Butchers*, 174 Tenn. 222, where picketing was enjoined upon the finding that it was conducted "for the purpose of coercing him (complainant) to join the union, or, upon his continued refusal, to injure or destroy his business." (174 Tenn. 228). The Court quoted the following rule with approval:

> "'Since the right to carry on a lawful business without obstruction is a property right, acts committed without just cause or excuse, which interfere with the carrying on of complainant's business and destroy his custom, his credit, or his profits, do an irreparable injury and authorize the issuance of an injunction.'" (174 Tenn. 230).

Conclusion

In summary, we respectfully insist that the Supreme Court of Tennessee has done nothing more in this case than

follow the principles laid down by this Honorable Court in that long line of decisions (see Note 1 above) culminating in the case of *International Brotherhood of Teamsters, Local* 695, *v. Vogt, Inc.*, 1 L. ed. 2d adv. sheets No. 15, p. 1347, 40 LRRM 2208, in finding that the picketing in question violated Tennessee's public policy on two different grounds and should be enjoined.

That public policy is not shown to be violative of the Constitution of the United States and therefore the writ should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify as attorney of record for the Respondent, L. A. Flatt, in the above styled and numbered cause in this Court that I have this day had mailed by air mail, postage prepaid, to Cecil Branstetter, Stahlman Building, Nashville, Tennessee, attorney of record for the Petitioners, at his said proper post office address, two true copies of this Brief in Opposition to the Granting of a Writ of Certiorari.

This 4th day of September, 1957.

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